LEGAL MISCELLANY.

A correspondent who states that he wrote at the request of some clients to the Commissioner of Internal Revenue, to inquire whether under the Excise Law any stamp duty was payable upon deeds of marriage settlement, of release, and other conveyances for a nominal consideration, requests us to publish the following reply, which has been sent him.

OFFICIAL.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Oct. — 1863.

SIR :—Your letter of September 5th has been received. In reply thereto I have the honor to state that any deed whereby real estate is *conveyed* is subject to stamp duty appropriate to the value of the estate conveyed; see "Conveyance," in the enclosed schedule.

The word "sold" in the Excise Law, as used in connection with stamp duties on conveyance, is used in the same sense as when incorporated in the phraseology of a deed; "bargained, sold," &c.

Wherever the owners of the land partitioned, are "*joint tenants*," the consideration of the interest conveyed, is the value of the right relinquished; the one tenant virtually exchanges his interest in the land, for the interest which the other relinquishes in the rest of the land; each joint tenant being seized "*per me et per tu*," (sic,) the partition is not a mere ascertainment of the several parts to which each is entitled, but is a substantive grant by which an estate in law passes, and the value of the land, is the measure of the stamp duty required.

Where the parties are "*tenants in common*," they hold by several and distinct titles, and are each seised of a distinct part of the lands; the partition is but a means of ascertaining their rights and severalty, aud the deed is not a grant, therefore no stamp is required.

Very respectfully,

Deputy Commissioner.

Our correspondent adds the following observations, which we beg not to be understood as adopting for our own :

A novel and interesting distinction is taken in this letter between joint tenants and tenants in common. The steady way in which legal principles are emancipated, in the United States, from the cramped influence of the common law, has been a subject of national

pride. We, as an eminent Western counsel once observed, "don't want English *common* law. We want the *best* law they have got. We want Queen Victoria's law." Indeed, we are capable of improving even on that.

In England, for instance, the real difference between joint tenancy and tenancy in common is supposed to consist, for the other incidents are but consequences, in unity of seisin. Joint tenants cannot, therefore, make partition by feoffment, for livery of seisin is impossible; but, for the same reason, they can, as tenants in common *cannot*, make partition by mutual releases. There is not, under "Queen Victoria's law," any "substantive grant" in such a case; nor does any distinct "estate in the land" pass, for each has already the whole in himself. In its conveyancing aspect, the transaction is the simplest possible; not the grant, but the relinquishment of a right. In this country, I may add, where survivorship is generally abolished, this distinction about unity of seisin is in fact all that remains, and of course is purely technical.

On the other hand in England tenants in common *have* a distinct seisin. It is true that there a tenant is *not* supposed to own "any distinct part of the lands," as we are agreeably surprised to learn that he does here. If he did, partition by deed would hardly be required; setting out fences, or stakes, would be all the conveyancing needed to ascertain his "rights and severalty." But, except in their "promiscuous possession," as Blackstone calls it, tenants in common are as strangers towards each other. Their reciprocal conveyances on a partition must be by grant and not by release. In form and fact they are the same as those required for the transfer of estates in severalty.

If, then, we had still remained under the common law, the deputy commissioner would have been obliged, if he went on mere technical grounds, to decide just the other way, and exact the payment of stamp duty on partition deeds of tenants in common, and not on those of joint tenants. He might, however, under some base pretext of common sense, escape by alleging that for the purposes of the stamp act, there is not a particle of difference between a joint tenant and a tenant in common; that each is the owner of an un-

divided interest in land, however technically described, and that the separation of that interest, when effected by deed of partition, is not in any sense a "sale" to a "purchaser" within the meaning of the law.

I may also be allowed in this connection to express my pleasure at finding that we are able to throw off the etymologies as well as the rules of the English law. The familiar words used in describing a joint tenancy, *per my et per tout*, used to be of Norman French descent, and to signify "by nothing, and by all," that is nothing separately, everything jointly. They are now for the first time proved to be Latin, perhaps of the Lower Empire when a good deal of attention was paid to the subject of taxation. *Per me et per tu*, which means "through me and through thee," or would, if it were *te* instead of *tu*, a trifling grammatical error, easily explained by the looseness of style of the old monkish writers. How striking the metaphor, and how expressive of the intimate and *penetrative*, if I may use the word, character of joint tenancy! It suggests the idea of the several owners being transfixed and strung together like fish on a legal twig. It throws us back to those old picturesque days when clods of earth and keys of doors were handed over to betoken seisin; and we may imagine two tenants embracing on their joint heritage, and as pledge and confirmation of the sweet unities of time title and possession, murmuring to each other the mystic rhyme,

"Through me,
Through thee."

I remember, indeed, to have seen, in the works of Mr. Palgrave and M. Michelet, just such "versicles" quoted as being the natural and popular expression, in early ages, of all legal truths.

In conclusion I must admit that while I have entire confidence in the progressive nature of legal science, there is one point in the letter which I do not exactly understand, and though I know I ought to take it on faith, I shall be glad if one of your more advanced readers will explain it to me. The deputy commissioner states that "*any* deed whereby real estate is *conveyed* is subject to stamp duty," *because* "the word 'sold' in the Excise Law is used in

the same sense as when incorporated in the phraseology of a deed, 'bargained, sold,'" &c. But I don't see how this helps him to his conclusion or solves my difficulty. These words, "bargain and sell," were introduced into certain kinds of conveyances in England, shortly after the Statute of Uses, to evade its operation. They alleged a real or pretended sale of the property to be transferred, which, in the view of a Court of Equity, made the vendor seised to *the use* of the vendee, and so, by force of the statute, the latter acquired at once the legal title, without livery of seisin. In deeds they are and always have been used "in the same sense" in which they would be used in ordinary speech, and no other; only in some cases a sale is *simulated* to avoid the inconvenience and publicity of a feoffment. Still, whether a sham or a reality, a *sale*, in the common sense of the word, is asserted; and if the consideration of that sale be one dollar, as in marriage settlements releases and the like, it is below the minimum expressly fixed by the stamp law, and therefore not subject to stamp duty. If, however, the deputy commissioner means, as I have a sort of hazy idea he does, that as marriage settlements, and so forth, are usually by deeds of "bargain and sale," they are actually *sales*, and as no real *pecuniary* consideration is therein expressed, the *value* of the property must be taken; then here again I can only helplessly appeal to your advanced contributors. I know marriage settlements, and so forth, are *not* sales, nor anything of the kind. If it is only the introduction of three technical and now insignificant words into a deed, which, by a legal metamorphosis, converts them into such, I apprehend the most demoralising evasions of the law. The lease and release used in England (except to the amount of the stamp on the lease), steers quite clear of such an interpretation of the stamp act, and in point of fact, as under the laws of most of the United States, mere recording has the same effect as livery of seisin, we may, by giving up the expensive luxury of the phrase "bargain and sell," escape altogether. Of course it would be very wrong to do this; but unfortunately judges whose minds have been vitiated by protracted study of law, might not see it in the same light. I have no confidence in the result, until the progressive doctrine is firmly

established, *first* that *everything* is within the Excise Act, whether therein named or not; and *second*, if not named, it is for that very reason subject to the highest duty to which anything therein named, of the same general character, is subject. On this basis the act can be read fluently, without trouble to lawyers or deputy commissioners.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Corporation—Bill in Equity by Minority of Stockholders—Fraud—Laches.—A minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and the other stockholders, for conspiracy and fraud, whereby their interests have been sacrificed, against the corporation and its officers and others who participate therein. By unreasonable delay, however, in bringing their bill, they will forfeit their title to equitable relief: *Peabody* vs. *Flint et al.*

Promissory Note—Delivery to one Payee for both—Joint Action upon.—An indorsement of a negotiable promissory note to two persons, payable one half to each, accompanied by a delivery thereof to one of them for the benefit of both, vests a valid title in them both, although the other indorsee was absent at the time and did not accept a transfer till afterwards; and they may jointly maintain an action upon it against the payee: *Flint et al.* vs. *Flint.*

Oral Award—Evidence.—An oral award by referees, under an oral submission, is competent evidence upon a question of disputed boundary between the parties: *Byam* vs. *Robbins.*

Homestead—Mortgage—Conditional Judgment of Foreclosure—Formal Possession.—A conditional judgment may be rendered in an action to foreclose a mortgage of land which does not convey an existing estate of homestead therein, and a formal possession may be taken on the execution, sufficient to bar the right in equity to redeem, without actually dispossessing those who are in under the estate of homestead: *Doyle* vs. *Coburn.*

[1] From Charles Allen, Esq., reporter, to appear in Vol. VI. of his reports.